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No. 88-342

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In the Supreme Court of the United States

OCTOBER TERM, 1988

SUNSHINE HEALTH SYSTEMS, INC., PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether, under 42 U.S.C. 1395*oo*(f)(2), the rate of prejudgment interest on an award of medicare reimbursement to a proprietary hospital is fixed by the rate allowed as reimbursement for return on equity to that hospital, or the rate allowed for return on equity to an extended care provider.

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OPINIONS BELOW

he February 6, 1987, decision of the court of appeals . App. 12a-33a) awarding petitioner increased medi- reimbursement and interest on the judgment is re- ed at 809 F.2d 1390. The March 22, 1988, decision of court of appeals (Pet. App. 1a-11a) reversing the dis- court's award of prejudgment interest at 15.875%, remanding for an award at 10.583%, is reported at F.2d 1097.

JURISDICTION

he judgment of the court of appeals of which peti- er seeks review was entered on March 22, 1988. Peti-

petition for rehearing was denied by the Ninth Cir-
May 19, 1988 (Pet. App. 34a). The petition for a
certiorari was filed on August 16, 1988. The juris-
of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

he Health Insurance for the Aged Act, Tit. XVIII
re Act), in 42 U.S.C. 1395*oo*(f)(2), authorizes the
t of interest to a prevailing party on judicial review
dicare reimbursement determination, and directs
h interest shall be "equal to the rate of return on
apital established by regulation pursuant to section
)(1)(B) of this title and in effect at the time the civil
* * is commenced" (*ibid.*). Section 1395x(v)(1)(B),
ed in 1966, directed the Secretary to promulgate
e regulations that allowed proprietary facilities
g extended care services to be reimbursed for "a
ble return on equity capital" (*ibid.*). The section
provided that the rate of return on equity was "not
eed one and one-half times the average of the rates
st" for certain specified debt obligations issued by
eral Hospital Insurance Trust (FHIT) Fund (*ibid.*).
ugh inpatient hospital services provided by pro-
hospitals were not included within the meaning of
ed care services," the Conference Report accom-
the bill that became Section 1395x(v)(1)(B) stated
he conferees expect that the Secretary * * * will
imilar or comparable principles in determining
ble costs for reimbursement of proprietary
s for services furnished by them." H.R. Conf.
17, 89th Cong., 2d Sess. 3 (1966). Accordingly, the
y issued 42 C.F.R. 405.429(a) (1985),[1] which pro-

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egulation was redesignated on September 30, 1986, and is
ed at 42 C.F.R. 413.157.

led that *all* proprietary providers—whether supplying ended care or inpatient hospital services—would be owed reimbursement based on a return on equity "set at percentage rate equal to *one and one-half times* the erage of the rates of interest on certain public debt ligations" (Pet. App. 5a (emphasis in original)).

In 1983, Congress enacted amendments to the Medicare t that established the prospective payment system PS),[2] and in so doing also reduced the rate of return on uity for proprietary hospitals to *one times* the average e of interest on the FHIT Fund bonds. See Social curity Amendments of 1983, Pub. L. No. 98-21, 501(g)(2), 97 Stat. 162 (codified at 42 U.S.C. (Supp. IV) 95ww(g) (2)).[3] The effect of Section 1395ww(g)(2) was "creat[e] a distinction between proprietary hospitals and ner proprietary providers * * * in the rate of return on uity capital to which each was entitled" (Pet. App. 5a). cordingly, in 1983, the Secretary amended 42 C.F.R. 5.429(a) (1985) to "set the rate of return for proprietary spitals at a rate *equal* to the average of specified interest es" (Pet. App. 5a (emphasis in original)), while keeping e "rate of return for all other proprietary providers (such skilled nursing facilities offering extended care), at *one d one-half times* the average rates" (Pet. App. 5a-6a

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Under the PPS, proprietary care providers were no longer re-ursed on a cost basis, but were "paid prospectively on the basis of determined rates for services" (Pet. App. 5a).

As amended in 1983, 42 U.S.C. (Supp. IV) 1395ww(g)(2) provided t

> the amount which is allowable, with respect to reasonable costs of inpatient hospital services for which payment may be made * * *, for a return on equity for hospitals shall * * * be equal to the average of the rates of interest [on certain public debt obligations].

te omitted; emphasis in original)).[4]

n February 1985, petitioner, Sunshine Health , Inc., sought judicial review of the Secretary's tion of a proprietary hospital owned and operated ioner as a "new hospital" under Medicare's "pros- payment system" (Pet. 3). The district court invali- e regulation under which the Secretary made that tion and awarded petitioner additional Medicare sement as well as interest on the judgment pur- o 42 U.S.C. 1395*oo*(f)(2) (Pet. App. 13a). The Circuit affirmed (Pet. App. 12a-33a), and the court subsequently awarded petitioner prejudg- terest at the rate of 15.875% (Pet. App. 2a).

Secretary appealed the district court's interest arguing that this rate of interest was inapplicable rietary providers of inpatient hospital services The court of appeals (Pet. App. 1a-11a) agreed, d that the correct rate of interest to be awarded er under the terms of 42 U.S.C. 1395*oo*(f)(2) was o (Pet. App. 2a), which was equal to the rate of sement for return on equity allowed to proprietary s under the regulation then in effect, 42 C.F.R. (a) (1985).

ruling, the court of appeals rejected petitioner's nt that Section 1395*oo*(f)(2) requires that the rate dgment interest for *all* types of Medicare providers at the rate of return on equity allowed to pro- facilities furnishing so-called "extended care serv-

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een months after this action was filed, 42 U.S.C.)(B) was amended to conform the rate of return on equity extended care services with the rate allowed for proprietary See Consolidated Omnibus Budget Reconciliation Act of . L. No. 99-272, § 9107(b)(2), 100 Stat. ~~160~~ 161. Accordingly, raised by petitioner herein applies only to the period from al application of the PPS—hospital cost reporting years on or after October 1, 1983—to the October 1, 1985, effec- of this amendment.

s." [5] The court also rejected petitioner's related conten-
n that the language of Section 1395x(v)(1)(B) required it
disregard the terms of 42 C.F.R. 405.429(a) (1985), as it
olied to petitioner, in determining the rate of prejudg-
nt interest due petitioner under Section 1395*oo*(f)(2).
itioner's suggestion that it ignore the regulation, the
urt said, was "in direct conflict with Congress' express
ent in this area" (Pet. App. 10a) to "inextricably link the
culation of interest with that provided for the return of
uity capital" (Pet. App. 8a).
The appeals court further found that, contrary to peti-
ner's assertion, Congress's failure to amend Section
95*oo*(f)(2) to include a reference "to [Section 1395ww
(2)] and its effect on the rate of return of equity capital
proprietary hospitals" (Pet. App. 9a n.7) did not
gate its intent that the prevailing return on equity rate
a proprietary hospital be applied to calculate the hos-
al's prejudgment interest. Rather, "[i]t [was] sufficient
t section 1395*oo*(f)(2) identifie[d] the relevant regula-
n for determining the proper rate of interest" (*ibid.*).
ally, the court observed that petitioner had not
llenged the applicable regulation on any ground that
uld properly be invoked to invalidate a regulation—that
that it exceeded the scope of the authority under which
vas promulgated, or was arbitrary, capricious, an abuse
discretion, or contrary to law, or because the pro-
lures followed in its issuance were improper (*id.* at 9a).
The appeals court accordingly concluded that "[t]he
gulations currently in effect were originally promulgated
rsuant to section x(v)(1)(B) and as amended are suffi-
nt for the purposes of litigation interest calculation"

As explained by the court of appeals below (Pet. App. 4a), "[t]he
ase 'extended care services' is defined in 42 U.S.C. 1395x(h) as
erring to various items and services furnished by a skilled nursing
ility to an inpatient of that facility, and does not include inpatient
pital services provided by proprietary hospitals, such as
titioner's]."

App. 10a). It therefore reversed and remanded the ith an instruction to award interest at the rate of % (Pet. App. 11a)—the applicable rate of reim- nent for return on equity for proprietary hospitals.

ARGUMENT

decision below is correct and does not conflict with cision of this Court or any other court of appeals. , as petitioner recognizes, the decision below is one st impression among the circuits and districts * * * " . Accordingly, review by this Court is unwarranted. Petitioner argues (Pet. 4) that "[c]ontrary to what ght intuitively expect," the rate of prejudgment in- warded to a proprietary hospital should be fixed at e of return for extended care facilities, rather than e fixed for proprietary hospitals. As the court of ap- orrectly determined, however, nothing in the Medi- ct requires this bizarre result. Section 1395*oo*(f)(2) ot say that the rate of interest must be equal to the return on equity capital under Section 1395x(v)(1) says that the rate of interest must be equal to the return on equity capital as "established *by regula-* ursuant to section 1395x(v)(1)(B)." The applicable ion, 42 C.F.R. 405.429(a) (1985), *was* established nt to Section 1395x(v)(1)(B). In its original form it to both extended care facilities and proprietary ls, and prescribed the same rate for each. This was gress intended. See H.R. Conf. Rep. 2317, 89th 2d Sess. 3 (1966). The fact that Section v)(1)(B) makes specific reference to extended care s does not mean that a regulation dealing with both ed care facilities and proprietary hospitals cannot established pursuant to that section.

Petitioner characterizes 42 C.F.R. 405.429(a) (1985), in amended form and as it relates to proprietary hospitals, a regulation promulgated pursuant to Section 1395ww)(2), to which Section 1395*oo*(f)(2) does not refer (Pet. 7). However, the fact that 42 C.F.R. 405.429(a) (1985) as subsequently revised to conform to a later congres- onal enactment does not negate its character as a reg- ation promulgated to carry out Congress's mandate in ection 1395x(v)(1)(B). In reducing the rate of return for rtain types of proprietary providers to conform to super- ening congressional enactments, the Secretary continued exercise authority conferred by Section 1395x(v)(1)(B). s the court of appeals recognized, Congress was not bliged to amend Section 1395*oo*(f)(2) to refer to later mendments changing the equity rate in order to preserve e applicability to prejudgment interest of the pertinent evailing rates set forth in 42 C.F.R. 405.429(a) (1985). ather, "[i]t [was] sufficient that section 1395*oo*(f)(2) entifie[d] the relevant regulation for determining the oper rate of interest" (Pet. App. 9a n.7).

2. Petitioner also argues (Pet. 7-9) that Congress could ot have intended the 1983 reduction in the return on quity rate effected by Section 1395ww(g)(2) to alter the te of prejudgment interest for proprietary hospitals be- use that section *now* contains a phase-down provision at eliminates reimbursement for return on equity to pro- ietary hospitals "for cost reporting periods beginning on after October 1, 1989." Consolidated Omnibus Budget econciliation Act of 1985, Pub. L. No. 99-272, 9107(a)(1), 100 Stat. 160. We recognize that, under the atute as it now stands, prejudgment interest would no nger be available to proprietary providers of inpatient ospital services after October 1, 1989. This anomalous sult, however, is the inevitable consequence of ongress's express intent to tie a provider's rate of pre- dgment interest to the same provider's rate of return

quity. Although Congress, in drafting Section
o(f)(2), may not have anticipated that an overhaul of
Iedicare reimbursement scheme would result in the
ng-out of reimbursement for return on equity, it did
ng to avoid the effect on prejudgment interest of the
-out it enacted. In any event, the anomaly has no ef-
n this case, in which petitioner received prejudgment
st at the rate of 10.583%. Any problems created by
hase-out in future cases should obviously be ad-
ed in the first instance by Congress.

CONCLUSION

e petition for a writ of certiorari should be denied.
spectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney

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